Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

75-434

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1975

OSAGE OIL AND TRANSPORTATION, INC. ..... *Appellant*

VS.

BOARD OF ADJUSTMENT OF
FAYETTEVILLE, ARKANSAS ..... *Appellee*

APPEAL FROM THE
SUPREME COURT OF ARKANSAS

JURISDICTIONAL STATEMENT

ESTHER M. WHITE
P.O. Box 624
Fayetteville, Arkansas 72701
Attorney for Appellant

TREVATHAN PRINTING COMPANY, NEWPORT, ARKANSAS

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SUPREME COURT OF ARKANSAS

JURISDICTIONAL STATEMENT

THE OPINIONS BELOW

The decision of the Supreme Court of Arkansas is reported at 258 Ark. 91, 522 S.W. 2d 836, and appears herein as Appendix A. The unreported judgment of the Circuit Court of Washington County, Arkansas, appears in Appendix C.

JURISDICTION

This action arose from a decision of the Board of Adjustment of the City of Fayetteville, Arkansas, denying appellant's application for a zoning variance. The judgment of the Arkansas Supreme Court was entered on June 16, 1975, the same date that appellant's timely motion for rehearing was denied. A notice of appeal to this Court was filed in the Arkansas Supreme Court on August 1, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2). Cases that sustain the jurisdiction of this Court include:

Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921)

Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405 (1935)

Reinman v. City of Little Rock, 237 U.S. 171 (1915).

STATUTES INVOLVED

The pertinent portions of Fayetteville City Ordinance No. 1747, Article VII, Sections 17 and 18 are as follows: Section 17 relates to "Business" signs ("on-site" signs), and Section 18 relates to "Outdoor Advertising" signs ("off-site") signs.

Article VII, Section 17, *Business Signs*

(A) In an A, R-O, C or I District there shall be erected for each establishment one or more flashing, indirectly illuminated business signs describing goods manufactured or sold on the premises, or services rendered, subject to the following conditions:

(B) In the C and I Districts, one business sign for each space of the building which shall:

1. not exceed one square foot in area for each two feet of building frontage or seventy-five (75) square feet in area;

2. be located not nearer than ten (10) feet from the adjoining premises;

3. not be nearer than fifteen (15) feet to the street line, except in C District;

4. not exceed the height of the structure in which the principal use is located or thirty feet, whichever is lower.

Article VII, Section 18, Signs: *Outdoor Advertising*

(A) The face of an advertising sign shall not be greater than twelve (12) feet in vertical dimension, not greater than twenty-five (25) feet in horizontal dimension, and shall not contain more than one advertising sign per facing.

(B) The maximum height of an advertising sign or structure erected upon the ground shall not exceed forty-five (45) feet above grade level at the base of such structure.

QUESTIONS PRESENTED

The question presented is whether an ordinance which limits the size of an "on-site" commercial sign to 75 square feet while allowing an "off-site" commercial sign with an area of up to 300 square feet arbitrarily discriminates between members of a class, and is therefore unconstitutional on its face or as applied to appellant in that it violates the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Appellant, the owner of a gasoline service station in Fayetteville, Arkansas, applied to the City of Fayetteville Board of Adjustment for a variance which would permit the erection of an advertising sign exceeding the 75 square foot limit fixed by a Fayetteville zoning ordinance. After denial of the variance requested, appellant appealed to the Circuit Court of Washington County, Arkansas, and was granted a trial *de novo* pursuant to Ark. Stat. Ann. §19-2830.1. At trial, the Circuit Court reversed the Board's decision, holding that the 75 square foot limit was unconstitutional on its face in view of other provisions in the ordinance which allowed greater dimensions for "off-site" advertising signs. The Judgment of the Circuit Court directed the Fayetteville Board of Adjustment to grant appellant's application for a variance. Subsequent to and in reliance upon this decision, appellant erected the business sign in question.

The Supreme Court of Arkansas, Byrd J. dissenting, reversed the decision of the Circuit Court, holding that the ordinance was not unconstitutional in that it was not arbitrary or unreasonable. Appellant's timely petition for rehearing was denied and judgment entered on June 16, 1975.

RAISING OF THE FEDERAL QUESTION

Since this case arose from a decision of a municipal zoning board which did not have the power to pass on a constitutional question, the issue of constitutionality of the zoning ordinance was raised for the first time on appeal to the Circuit Court of Washington County, Arkansas. Special leave to raise the issue of constitutionality was granted by

an Order of the Washington County Circuit Court Judge, Maupin Cummings. (Appendix D).

At the trial in Washington County Circuit Court, appellant advanced the argument that business advertisers, whether advertising on or off their premises, comprise a single class — particularly in the case of a gasoline service station owner whose "on-site" sign is his most important means of advertising his product and its price. Because of the fact that Fayetteville City Ordinance No. 1747 discriminates arbitrarily between "on-site" and "off-site" advertisers, appellant contended that this ordinance deprived the business advertiser of equal protection and due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. Upon submission of briefs and oral argument, the Washington County Circuit Court concluded that the ordinance did in fact violate the equal protection and due process clauses of the Fourteenth Amendment, and entered a judgment declaring Section 17 unconstitutional.

On appeal, the Arkansas Supreme Court reversed the judgment of the Washington County Circuit Court. It was the opinion of the Arkansas Supreme Court that the restrictions imposed by the ordinance in question were not arbitrary and unreasonable, and that therefore the ordinance did not offend the Fourteenth Amendment.

THE QUESTION PRESENTED IS SUBSTANTIAL

The question presented on this appeal has never been directly passed upon by this Court. With the ever-increasing complexity and comprehensiveness of zoning ordinances, the question is of importance, as there exists a need for definition as to the extent that a legislative body may

classify and sub-classify restricted uses consistent with property owners' rights. This appeal involves such a sub-classification — a restrictive sign ordinance included within a comprehensive zoning scheme. The principles involved, however, can be extended to any situation where the members of a class of property owners are restricted in the use of their property by arbitrary and unreasonable zoning classifications.

The basic power of a municipality to regulate the size and location of commercial signs is of course not in issue here, as this power is directly related to the health, safety, morals and welfare of the community. This is particularly true with regard to the threat to the safety of motorists which large roadside signs pose. It is not easy to justify, however, in terms of health, safety, morals and welfare, why a large "off site" business sign poses any greater danger than would an "on site" sign of the same size.

The distinction between "on site" and "off site" commercial sign restrictions in zoning ordinances has been the topic of a surprising amount of litigation. The jurisdictions addressing this question have by no means been uniform in their application of the law or in their rationale for holding a particular ordinance to be constitutional or unconstitutional. A line of New York cases have upheld the validity of the distinction between "on site" and "off site" business signs, provided the distinctions were applied in a reasonable manner. *Cromwell v. Ferrier*, 19 N.Y. 2d 263, 279 N.Y.S. 2d 22, 225 N.E. 2d 749 (1967). Contrasted with this reasoning is the holding of a Florida case, *Sunad, Inc. v. City of Sarasota*, 122 So. 2d 611 (Fla. 1960). In this case, an ordinance similar to the one now in question, was invalidated, the Court finding no reason to distinguish between

"on site" and "off site" signs. This decision, however, rested primarily on aesthetic considerations.

In its decision on this question, the Arkansas Supreme Court clearly stated that its decision was not based on aesthetic considerations, but instead held that the distinction was not applied arbitrarily or unreasonably. Appellant submits that this is a real and substantial question, and applies not only to this case, but to numerous other zoning distinctions where property owners' rights have been infringed upon.

CONCLUSION

The questions presented by this appeal are substantial and of broad public importance. It is respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

ESTHER M. WHITE
P.O. Box 624
Fayetteville, Arkansas 72701

Attorney for Appellant

APPENDIX

Opinion of the Arkansas Supreme Court ..... A

Judgment of the Arkansas Supreme Court ..... B

Judgment of the Washington County Circuit Court C

Order of the Washington County Circuit Court allowing appellant to raise constitutional issue ..... D

Order on Rehearing ..... E

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Appendix "A"

SUPREME COURT OF ARKANSAS

No. 75-25

BOARD OF ADJUSTMENT OF FAYETTEVILLE, *Appellant* v. OSAGE OIL & TRANSPORTATION, INC. *Appellee*	Opinion Delivered: May 12, 1975. Appeal from Washington Circuit Court; Maupin Cummings, Judge. *Reversed.*

GEORGE ROSE SMITH, *Associate Justice*

GEORGE ROSE SMITH, J. This zoning case presents a question of constitutional law. The appellee, as the owner of a gasoline service station in Fayetteville, applied to the appellant Board of Adjustment for a variance that would permit the appellee to erect at its service station an advertising sign exceeding in size the limit of 75 square feet fixed by the zoning ordinance. The Board unanimously denied the request. On appeal the circuit court reversed the Board's decision, holding that the 75-foot limitation is invalid on its face, in view of other provisions in the ordinance. Whether that holding is correct is the only question before us.

The ordinance contains extensive and detailed provisions governing a wide variety of signs that are permitted or prohibited in differing zoning districts. We need not set forth the numerous restrictions imposed by the ordinance, but we do stress the fact that the appellee is challenging a single provision in a very comprehensive zoning ordinance.

This controversy centers upon the city's distinction between a "business sign," which relates to goods or services available on the premises where the sign is situated, and an "outdoor-advertising sign," which relates to goods or services available elsewhere. Business signs are not to exceed 75 square feet in size, though there may be one on each face of a building. Outdoor-advertising signs cannot be more than 25 feet long or 12 feet high, so that a maximum area of 300 square feet is possible.

The basic power of a municipality to regulate the size and location of billboards and other commercial signs has been sustained in so many jurisdictions that it would be a waste of time and effort to cite the cases. Such regulations have been upheld upon many grounds, including the promotion of traffic safety, the control of potentially hazardous structures, and the fundamental considerations of city planning and city beautification that underlie the zoning concept itself. We have sustained simple regulations affecting signs. *Seiz v. City of Hot Springs,* 194 Ark. 544, 108 S.W. 2d 897 (1937); *Berkau v. City of Little Rock,* 174 Ark. 1145, 298 S.W. 514 (1927).

Moreover, the particular distinction now before us, between on-site and off-site advertising signs, has almost invariably been held to be constitutional. In a recent case, *Cromwell v. Ferrier,* 19 N.Y. 2d 263, 279 N.Y.S. 2d 22 (1967), the Court of Appeals had this to say: ". . . petitioner argues that the legislative distinction between identification signs [on-site] and nonaccessory signs [off-site] is unreasonable and discriminatory. Neither *Bond* [a prior N.Y. case] nor any other decision of this court has dealt specifically with this point but numerous cases from other jurisdictions have had occasion to do so. In nearly all, zoning ordinances which have distinguished between accessory and nonaccessory signs have been upheld, providing that the distinctions were applied in a reasonable manner."

Perhaps the leading opinion upon the point is that of Justice Brennan in *United Advertising Corp. v. Borough of Raritan,* 11 N.J. 144, 93 A 2d 362 (1952). There the controlling legislative measure prohibited all off-site signs and enacted many restrictions upon the size and location of on-site signs. The court upheld the law, pointing out that a business sign is in actuality part of the business itself, but an outdoor advertising sign lacks that characteristic and is therefore subject to different treatment.

It goes without saying that in the case at bar the ordinance is presumed to be constitutional and the burden of showing its invalidity is upon the appellee. *Rebsamen Motor Co. v. Phillips,* 226 Ark. 146, 289 S.W. 2d 170, 57 A.L.R. 2d 1256 (1956). The appellee offered no proof whatever to support its contention that the ordinance is unreasonably discriminatory. Our inquiry is thus limited to the face of the ordinance, with every presumption being in its favor.

It is argued that since the appellee's proposed sign would advertise the service station, the appellee is therefore an advertiser and must be treated precisely the same as outdoor advertisers (who are permitted to erect signs as large as 300 square feet). This argument illustrates the fallacy in the appellee's position. The on-site business sign and the off-site outdoor billboard fall into different categories, are erected for different purposes, and are subject to different regulations. As Justice Brennan pointed out: "The business sign is in actuality a part of the business itself, just as the structure housing the business is a part of it, and the authority to conduct the business in a district carries with it the right to maintain a business

sign on the premises subject to reasonable regulations in that regard as in the case of this ordinance." *United Advertising, supra.*

The outdoor advertising sign, on the other hand, is not maintainable as a matter of right; such signs have been prohibited altogether. See the extended discussion in *General Outdoor Adv. Co. v. Department of Public Works,* 289 Mass. 189, 193 N.E. 799 (1935). The controlling issue is not that of comparing the city's regulation of on-site signs with its regulation of off-site signs. Instead, the question is whether the 75-foot limitation upon business signs is unreasonable and arbitrary. That question is plainly one of fact, upon which the record is wholly and fatally devoid of proof.

A related argument is that since the appellee could buy a lot across the street from its service station and erect a 300-foot billboard there, it has a right to erect a similar sign upon the service station site. That argument was rejected in Justice Brennan's opinion and, inferentially, in the *Cromwell* case, where it was urged by the dissenting judges. The flaw in the argument lies in its disregard of the fundamental differences between on-site signs and off-site signs.

The trial court, in holding the restriction to be void on its face, declared that "the harm done by large signs is the same, regardless of who puts them up." The appellee makes a similar contention. We cannot agree with such a generalization, which would ultimately invalidate all billboard regulation. The purpose of the Fayetteville ordinance and similar legislation is obviously to reduce the number and size of billboards and other signs, else there would be no point in the enactment. In case after case large signs have been excluded from residential districts, parks, recreation areas, highway frontages, and the like, without regard to "who puts them up." As we have seen, the proprietor of an on-site business is subject to restrictions reasonably appropriate to his situation. Here there is no proof that the Fayetteville ordinance is an unreasonable or arbitrary measure. By contrast, the ordinance which was invalidated in *Sunad, Inc. v. City of Sarasota,* 122 So. 2d 611 (Fla., 1960), cited by the appellee, placed no limit whatever upon the size of on-site signs. The court rested its decision on esthetic considerations and on that basis found no reason to distinguish one large sign from another. That is not our basis for upholding the Fayetteville zoning restrictions.

Reversed.

Byrd, J., dissents.

Appendix "B"

FILED
REVERSED-LAW
75 JUN 17 AM 8:52
WASHINGTON COUNTY, ARK.
ALMA KOLLMEYER
CIRCUIT CLERK

STATE OF ARKANSAS, In the Supreme Court } SCT.

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 7th day, being the first Monday of October, A. D. 19 74, amongst others were the following proceedings, on the 12th day of May, A. D. 19 75, a day of said term:

Board of Adjustment of Fayetteville, Appellant,

No. 75-25 vs.] Appeal from Washington Circuit Court, District,

Osage Oil & Transportation, Inc., Appellee.

THIS CAUSE came on to be heard upon the transcript of the record of the Circuit Court of Washington County, District, and was argued by counsel; on consideration whereof it is the opinion of the Court that there is error in the proceedings and judgment of said Circuit Court in this cause as set out in the opinion herein delivered.

IT IS THEREFORE CONSIDERED by the Court that the judgment of said Circuit Court in this cause rendered be, and the same is hereby, reversed, annulled and set aside with costs; and that this cause be remanded to said Circuit Court for further proceedings to be therein had according to law, and not inconsistent with the opinion herein delivered.

IT IS FURTHER CONSIDERED that said appellant recover of said appellee all its costs in this Court in this cause expended, and have execution thereof.

IN TESTIMONY, That the above is a true copy of the judgment of said Supreme Court rendered in the case therein stated, I JIMMY H. HAWKINS, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the City of Little Rock, this 16th day of June, A. D. 19 75.

JIMMY H. HAWKINS, CLERK
By Doris L Williams, D.C.

BEST COPY AVAILABLE

Appendix "C"

IN THE CIRCUIT COURT OF
WASHINGTON COUNTY, ARKANSAS

OSAGE OIL & TRANSPORTATION, INC. ..... *Appellant*

v. No. 8787

BOARD OF ADJUSTMENT OF
FAYETTEVILLE, ARKANSAS ..... *Appellee*

JUDGMENT

On this 19th day of July, 1974, comes on for consideration in the above styled case the constitutionality of Fayetteville City Ordinance No. 1747, Article VII, Sec. 17; Appellant appearing by their attorney, Esther M. White, and Appellee appearing by their attorney, David R. Malone. Being advised in the premises, both parties having submitted briefs and given oral arguments, the Court makes the following findings:

Fayetteville City Ordinance No. 1747, Article VII, Section 17 is unconstitutional.

1. The ordinance prohibits on site business advertising with signs exceeding 75 square feet in area. "In the C and I Districts, one business sign for each space of the building which shall not exceed . . . seventy-five (75) square feet in area," (Sec. 17, b-1). However, an "outdoor advertiser" can place a sign on the same premises as long as it does not exceed 300 square feet in area. "The face of an advertising sign shall not be greater than twelve (12) feet in vertical dimension, not greater than twenty-five (25) feet in horizontal dimension," (Sec. 18, Signs: Outdoor Advertising). This discriminates against on-site business advertisers as a class.

2. It is clear that the City has the power to make certain regulations concerning advertising signs under its

police powers. However, the harm done by large signs is the same, regardless of who puts them up. By prohibiting the use of large signs by the operators of businesses on the premises, while allowing their use on the same premises by outdoor advertisers, the City is making a distinction where there is no difference. The operator of a business may not advertise his own business on his own premises with a sign larger than seventy-five (75) square feet in area, but he may under the ordinance rent space on the premises to an outdoor advertiser who can erect a sign up to three hundred (300) square feet in area. Thus the treatment given the two types of advertisers by the City Ordinance No. 1747 is without rational basis, and a violation of Equal Protection.

3. Further, by prohibiting a businessman to advertise on his premises with a sign greater than seventy-five (75) square feet in area where an outdoor advertiser would be allowed to do so, the City is depriving the businessman of the use of his property without Due Process of Law.

IT IS, THEREFORE, ORDERED AND ADJUDGED that Section 17 of Article VII of Fayetteville City Ordinance No. 1747 be and is hereby declared unconstitutional.

IT IS FURTHER ORDERED AND ADJUDGED that action of the Board of Adjustment in disallowing the application of plaintiff for variance be and is hereby set aside, and the Board of Adjustment is ordered and directed to approve the application of plaintiff for variance.

/s/ Maupin Cummings
Maupin Cummings
Circuit Judge

FILED: July 22, 2:40 p.m., 1974
Alma Kollmeyer, Circuit Clerk
Washington County, Arkansas
Book 51, Page 742 & 743

Appendix "D"

IN THE CIRCUIT COURT OF
WASHINGTON COUNTY, ARKANSAS

OSAGE OIL & TRANSPORTATION, INC. ..... *Appellant*

vs. No. 8787

BOARD OF ADJUSTMENT OF
CITY OF FAYETTEVILLE, ARKANSAS ..... *Appellee*

ORDER

The question of whether or not the Petitioner, Osage Oil & Transportation, Inc., has the right to raise the constitutionality of the zoning ordinance on an appeal from a decision of the Board of Adjustment of the City of Fayetteville, denying a request for a variance, is resolved in the affirmative.

There is no Arkansas case directly in point. Other states are divided on the question.

The more rational and practical position would be to allow the ordinance to be questioned only after relief under its provisions had been denied. If the relief requested had been granted the petitioners would have no standing to question the constitutionality of the ordinance. Since the courts of Arkansas have held the proceeding to be "de novo" in Circuit Court, this is the first time petitioner could raise the question as the Board of Adjustment is merely an administrative body without power to pass on constitutional questions.

The petitioner is hereby granted permission to raise the issue of the constitutionality of the City of Fayetteville,

Arkansas Ordinance No. 1747 by written brief which is due within thirty (30) days.

City of Fayetteville is granted thirty (30) days after receipt of petitioner's brief to file a reply brief.

Oral argument will be granted upon the request of either attorney.

ENTERED THIS 25TH DAY OF JULY, 1973.

/s/ Maupin Cummings
Maupin Cummings
Circuit Judge

FILED: July 26, 10:48 a.m., 1973
Alma Kollmeyer, Circuit Clerk
Washington County, Arkansas
Book 50, Pages 206 & 207

Appendix "E"

ORDER ON REHEARING

No written Order on Rehearing was received. The following Per Curiam Order delivered on June 16, 1975, appears in Volume 258 of the Arkansas Reports:

Rehearings denied:

75-25. *Board of Adjustment of Fayetteville, Arkansas v. Osage Oil and Transportation, Inc.*

Appendix "F"

IN THE SUPREME COURT OF ARKANSAS

BOARD OF ADJUSTMENT OF
FAYETTEVILLE, ARKANSAS ..... *Appellant*

VS. No. 75-25

OSAGE OIL & TRANSPORTATION, INC. ..... *Appellee*

NOTICE OF APPEAL
TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Osage Oil and Transportation, Inc., the Appellee above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Arkansas entered on June 17, 1975, reversing the judgment of the Circuit Court of Washington County, Arkansas, which had held a Fayetteville, Arkansas zoning ordinance repugnant to the Constitution of the United States. This appeal is taken pursuant to 28 U.S.C. §1257(2).

ESTHER M. WHITE
Attorney at Law
P.O. Box 624
Fayetteville, Arkansas 72701